FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(San Francisco, California)

JEFF LEOPOLD and GUENTER LEOPOLD
d/b/a/ STANDARD 5 – 10 & 25 CENT STORES 1/

Employer

and

RAYMOND M. NUSS, An Individual

Petitioner

and

UNITED FOOD & COMMERCIAL WORKERS UNION
LOCAL 101, UNITED FOOD & COMMERCIAL WORKERS
UNION, AFL-CIO 2/

Union

20-RD-2359 **DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record **3**/ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **4**/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer. **5/**

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act. 6/

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: **7**/

All employees employed by the Employer within the City and County of San Francisco, California; excluding office clerical employees 8/, owners, managers 9/ and supervisors 10/ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

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period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Food & Commercial Workers Union Local 101, United Food & Commercial Workers Union, AFL-CIO**.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before December 18, 2002**.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by December 26, 2002.

Dated December 11, 2002

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

1/ The Employer's name is in accord with the parties' stipulation.

2/ The Union's name is in accord with the parties' stipulation.

3/ The parties stipulated, and I find, that the record herein shall include the record in Case 20-RD-2354, a case involving the same bargaining unit, wherein a hearing was held on October 30, 2002. The petition in that matter was withdrawn on November 18, 2002.

4/ The parties stipulated, and I find, that the Employer, a general partnership of Jeff Leopold and Guenther Leopold, with a facility in San Francisco, California, is engaged in the retail sale of general merchandise. During the twelve-month period ending September 30, 2002, the Employer derived gross revenues in excess of $500,000, and purchased and received goods valued in excess of $5,000, which originated outside the State of California. Based on the parties' stipulation to such facts, I find that the Employer is engaged in commerce within the meaning of the Act.

5/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

6/ The only issue presented herein is whether there is a contract bar to this proceeding. The Union contends that such a bar exists while the Employer and the Petitioner take the opposite position. The petition herein was filed on November 18, 2002.

The parties stipulated, and I find, that the Union and the Employer have had a long-standing collective-bargaining relationship, pursuant to which successive collective-bargaining agreements have been negotiated. The record reflects that the most recent collective-bargaining agreement between the parties was effective by its terms for the period July 1, 1999, to and including June 30, 2002. On June 19, 2002, the Union and the Employer agreed, in writing, to extend this agreement through and including July 31, 2002.

On August 13, 2002, the parties met and reached an agreement on various issues, including modifications in the wage rates, dental benefits, and jury duty provisions of the Agreement. Their agreement was embodied in a written Memorandum of Understanding (MOU). At their meeting on August 13, the Employer and the Union also discussed the MOU as being conditional upon ratification by the Union's membership the following week. The record contains a copy of the MOU, which is an unsigned three-page document sent by the Employer's attorney to the Union via facsimile transmission on August 14, 2002. The MOU includes new sections covering jury duty, health and welfare, sick leave, wage rates and the term of the agreement. A handwritten

notation from the Employer's representative on the facsimile transmittal form accompanying the MOU from the Employer's representative to the Union representative states: "Please review."

The Union's membership ratified the MOU on August 22 and, by letter dated August 26, the Union notified the Employer of the ratification. Also in the letter, the Union advised the Employer that it would send the Employer a copy of the agreed changes for its proofing and that after the Employer had completed its proof-reading, the Union would create copies of the new contract for the appropriate signatures. Thereafter, the Union representative spoke to the Employer representative by telephone and confirmed that the MOU had been ratified; that the Union would print up the new agreement with the new language shaded and with old or invalid language struck through; and would send the Employer a copy for proofing. After the agreement was proofed, the Union would print up three copies for signatures to distribute to the membership.

It is undisputed that prior to the filing of the petition in this case, the Union never sent to the Employer either the agreed to changes for proof reading or a copy of the new contract for execution. Nor had the MOU or any other agreement between the Employer and the Union been signed as of the filing of the petition herein.

After being informed that the Union membership had ratified the MOU, the Employer implemented the wage changes negotiated as set forth in that document effective as of the date of ratification. The changes in the dental coverage were implemented by the Employer as of October 1, 2002.

Analysis. It is well settled that in order to serve as a bar to the filing of a petition, a contract must be signed by all parties prior to the filing of the rival petition. *De Paul Adult Care Communities, Inc.,* 325 NLRB 681 (1998; *Appalachian Shale Products Co.,* 121 NLRB 1260, 1162 (1958). There is no requirement that the parties execute a printed, final contract. Rather, as stated by the Board in *Seton Medical Center*, 317 NLRB 87 (1995), "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures." This does not mean that contracts must be formal documents or that they cannot consist of an exchange of a written proposal and a written acceptance. *Georgia Purchasing,* 230 NLRB 1174 (1977). It does mean, however, that in such instances, the informal documents that are exchanged must be signed by all of the parties in order to serve as a bar to an election. *Appalachian Shale Products Co*., 121 NLRB

1160 (1958); *Yellow Cab*, 131 NLRB 239 (1961); and *United Telephone Co. of Ohio*, 179 NLRB 732 (1969). Similarly, the documents must establish the identity and the terms of the agreement. See *In re Pontiac Ceiling & Partition Co., L.L.C.*, 337 NLRB No. 16 (December 20, 2001); *Branch Cheese*, 307 NLRB 239 (1992).

In the instant case, it is undisputed that the Employer and the Union have never executed a new agreement and have never exchanged documents that on their face set out or referred to the terms of the agreement and left no doubt that they amounted to an offer and an acceptance of those terms through the parties' affixing of their signatures. In this regard, the MOU transmitted by the Employer to the Union on August 14, 2002, is unsigned and the notation accompanying it requests only that the Union review it. Such documentation is insufficient to serve as a contract bar to the instant petition. Nor can this deficiency be rectified by the ratification of the MOU by the Union's membership or the Employer's implementation of the terms of the MOU upon learning that it had been ratified. *Seton Medical Center, supra.* Accordingly, I find that there is no contract bar to the instant petition.

In reaching the foregoing conclusion, I have carefully considered the cases and arguments relied upon by the Union in arguing that a contract bar does exist. In this regard, I note that in *Georgia Purchasing, Inc*., 230 NLRB 1174 (1977), the Union's telegram set forth the terms of the agreement and the Employer's telegram confirmed the renewal of the parties' agreement under the terms of the Union's telegram. Thus, it was clear from the face of the parties' communications that a final agreement had been reached. Here we have no similar written affirmation of the existence of a final agreement. Likewise, the Union's reliance on *Seton Medical Center*, 317 NLRB 87 (1995), is misplaced. In *Seton,* the Board found no contract bar even though the parties had exchanged initialed tentative agreements; had prepared an unsigned document summarizing all of the tentative agreements reached; the contract had been ratified; and the employer had implemented its terms. The Board concluded that there was no contract bar in the absence of a signed writing specifying the overall terms of the contract. The Board's observation in reaching this conclusion appears equally applicable in the instant case:

> In striking the balance between stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives, we think that the relatively minor requirement that parties which have reached agreement sign a document (or exchange signed documents) reflecting that agreement and showing that they have reached accord on a total contract is still necessary and appropriate to establish a contract bar. 317 NLRB at 88. (footnote omitted).

Accordingly, I find that there is no contract bar and I decline to dismiss the petition on this basis.

7/ It is well established that the appropriate unit in a decertification election must be coextensive with the certified or recognized unit (see *Campbell's Soup Co.*, 111 NLRB 234 (1955). Accordingly, the unit appears in accordance with the parties' most recent collective-bargaining agreement.

8/ The parties further stipulated, and I find, that Computer Analyst Lisa Dungca should be excluded from the unit as an office clerical employee.

9/ The parties stipulated, and I find, that Supervisors Richard Wu, Andrea Rock and Michael Ma, should be excluded from the unit as statutory supervisors.

10/ The parties stipulated, and I find, that Store Manager Martin Espinoza and Office Manager Marjorie Blake should be excluded from the unit as managerial employees. The parties also stipulated, and I find, that there is another managerial position that was vacant at the time of the hearing that the Employer was seeking to fill and that if that position were filled, that person would also be excluded from the unit as a managerial employee. However, the record is silent with respect to the title of this position.

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